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No. 84-131

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTAKE WATER COMPANY, APPELLANT

v.

YELLOWSTONE RIVER COMPACT COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

MOTION TO DISMISS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court has jurisdiction under 28 U.S.C. 1253 over an appeal from a judgment entered by a three-judge district court when the appellant challenges only the denial of declaratory relief and not the denial of injunctive relief.

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The Solicitor General, on behalf of L. Grady Moore, the federal member of the Yellowstone River Compact Commission, moves the Court to dismiss this appeal for lack of jurisdiction.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 4a-15a) is unreported.

JURISDICTION

The judgment of the three-judge district court was entered on October 25, 1983 (J.S. App. 1a). Appellant's motion for reconsideration was denied on April 30, 1984 (J.S. App. 16a-17a). A notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed on May 25, 1984 (J.S. App. 18a-19a), but appellant has never filed a notice of appeal to this Court. The jurisdictional statement was filed on July 24, 1984. The jurisdiction of this Court is

invoked under 28 U.S.C. 1253. For the reasons discussed below, we believe the Court should dismiss the appeal for lack of jurisdiction.

STATEMENT

1. On October 30, 1951, Congress granted its consent to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River (ch. 629, 65 Stat. 663 *et seq.*). Article X of the Yellowstone River Compact provides in pertinent part that "[n]o water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." 65 Stat. 669. Appellant, Intake Water Company, desires to divert appropriated waters from the Yellowstone River outside the Yellowstone River Basin (J.S. 3). Unable to secure the consent of all three states to its proposed diversion, appellant filed the present action in the United States District Court for the District of Montana in June 1973.[1] In Count II of its second amended complaint, appellant sought both a declaratory judgment that Article X of the Compact is unconstitutional and a permanent injunction preventing its enforcement (J.S. App. 7a).[2] In particular, appellant contended that Article X constitutes an

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[1]Appellant named as defendants the Yellowstone River Compact Commission, the individual members of the Commission, the Attorney General of the State of Montana, the State Engineer of the State of North Dakota, and the North Dakota State Water Commission. Article III of the Compact provides that one representative on the Commission shall be selected by the Director of the United States Geological Survey and shall act as Chairman of the Commission without voting privileges except in specified instances. 65 Stat. 665.

[2]Count I of the second amended complaint challenged the constitutionality of a Montana statute that was repealed prior to the district court's decision (J.S. App. 6a-7a). Count III alleged that Article X of the Compact violated the Equal Protection Clause of the Fourteenth Amendment because it called for diversions from the Yellowstone River to be treated differently than diversions from other rivers in Montana

impermissible burden on interstate commerce in that it requires the unanimous consent of three states before any interbasin water transfer is allowed (*ibid.*).

At the time this case was filed, a three-judge district court was required to hear any suit in which a party sought an interlocutory or permanent injunction restraining the enforcement of a state statute on federal constitutional grounds. 28 U.S.C. (1970 ed.) 2281.[3] Appellant's complaint included a request, based on federal constitutional grounds, that the enforcement of a Montana statute be enjoined. See note 2, *supra*.

The three-judge district court held that appellant's second amended complaint failed to state a claim for relief and must be dismissed (J.S. App. 15a). The court dismissed the Commerce Clause claims for declaratory and injunctive relief contained in Count II on the following grounds (*id.* at 8a-9a):

> [Appellees] rely on the following argument: The Yellowstone River Compact, as a compact between states, was approved by the United States Congress; because the Compact was approved by Congress, the Compact is federal, not state law for consideration of Commerce Clause objections; therefore, the Compact cannot, by definition, be a state law impermissibly interfering with interstate commerce, but must be a federal law immune to Commerce Clause objections. We find this argument compelling. When Congress approved the Compact, Congress was acting within its authority to

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(J.S. App. 7a). Count IV sought a declaration that appellant's proposed diversion was outside the regulatory purview of the Compact (*id.* at 7a-8a).

[3]This statute was repealed prospectively by the Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 *et seq.*

immunize state law from Commerce Clause objections by converting it to federal law. Therefore, Count II fails to state a claim for relief.[4]

2. In addition to its attempt to invoke this Court's jurisdiction under 28 U.S.C. 1253, appellant has taken a simultaneous appeal to the United States Court of Appeals for the Ninth Circuit. As indicated in its notice of appeal to the court of appeals (J.S. App. 18a-19a) and its jurisdictional statement (J.S. 7), appellant challenges only the denial of declaratory relief sought in Count II. No appeal has been taken from either the dismissal of the other claims raised by appellant or the denial of appellant's request for injunctive relief in Count II.

ARGUMENT

Inasmuch as appellant challenges only the district court's denial of declaratory relief, this appeal may not be brought directly to this Court under 28 U.S.C. 1253, but instead must be brought to the court of appeals under 28 U.S.C. 1291. Appellant concedes (J.S. 7-10) that the court of appeals has jurisdiction over its appeal, but it has filed a jurisdictional statement as a "protective" measure, requesting that this Court stay its hand pending disposition of the appeal before the court of appeals. Whatever the merits of this suggestion in the abstract, it ought to be rejected here in light of this Court's clear precedents holding that an appeal under Section 1253 will not lie in the circumstances of this case.[5]

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[4]The district court did not address Count I in light of the repeal of the Montana statute and dismissed Counts III and IV for failure to state a claim (J.S. App. 6a-7a, 11a-14a). Appellant does not challenge these rulings (see J.S. 6 n.7).

[5]It may well be that the appeal should be dismissed for the additional reason that appellant has never filed a notice of appeal to this Court. Invocation of this Court's jurisdiction under 28 U.S.C. 1253 requires that a notice of appeal to this Court be filed within 60 days of the district

This Court has twice held in identical circumstances that a direct appeal does not lie under Section 1253. In *Beal* v. *Doe*, 432 U.S. 438 (1977), the respondents had sought both declaratory and injunctive relief before a three-judge district court but had appealed only the partial denial of declaratory relief to the court of appeals. Because the respondents had not sought review of the district court's denial of injunctive relief, this Court, after granting certiorari, held that the court of appeals had jurisdiction over respondents' appeal. 432 U.S. at 443 n.5. In *Carey* v. *Wynn*, 439 U.S. 8 (1978), a three-judge district court granted a declaratory judgment but denied plaintiffs' request for injunctive relief. The appeals to this Court from the declaratory judgment were dismissed for want of jurisdiction on the ground that Section 1253 "does not authorize an appeal from the grant or denial of declaratory relief alone" (439 U.S. at 8).[6]

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court's final judgment. 28 U.S.C. 2101(b). The failure to file a timely notice of appeal requires dismissal of the appeal. See, *e.g.*, *Gabriel* v. *United States*, 429 U.S. 877 (1976); *Charger Investments, Inc.* v. *Corbett*, 429 U.S. 877 (1976). In this case, appellant filed only a notice of appeal "to the United States Court of Appeals for the Ninth Circuit" (J.S. App. 18a). That notice would appear to be deficient for the purpose of an appeal to this Court in that it does not "specify the statute or statutes under which the appeal to this Court is taken" (Sup. Ct. R. 10.2). Appellant's representation in its notice of appeal to the court of appeals that it intended to file a timely jurisdictional statement (J.S. App. 19a) presumably is not an effective substitute for the timely filing of a notice of appeal containing all of the elements required by Rule 10.2.

[6]Similarly, in *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), this Court strictly construed 28 U.S.C. 1252, ruling that a party does not have a right to direct review in this Court unless the holding of federal statutory unconstitutionality is in issue. If a party does not contest the holding of statutory unconstitutionality and seeks review only of another portion of the lower court's judgment, "the party should file a notice of appeal to the appropriate court of appeals." Slip op. 14. Just as

Because the present case, like *Beal* and *Wynn,* involves an appeal only from the claim for declaratory relief, and not from the claim for injunctive relief, appeal lies in the court of appeals. Appellant agrees but nevertheless suggests (J.S. 10) that this Court should defer consideration of this appeal until the court of appeals either dismisses its appeal for lack of jurisdiction or rules on the merits. Appellant has not suggested any compelling reason for deferral by this Court, and we can perceive of none in the circumstances of this case, in which it is plain that the court of appeals has exclusive jurisdiction over the appeal.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1984

Edwards holds that Section 1252 requires that the constitutional question must be at issue for direct review in this Court to lie, *Beal* and *Wynn* require that the grant or denial of injunctive relief must be at issue in order for jurisdiction to be properly invoked under Section 1253.

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